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Furthermore, by recognizing the probative value of personal opinion testimony under limited circumstances, the court should go on to realize that the same value is present when the personal opinion testimony comes in by itself and that safeguards are available to prevent any adverse effects of such an offer of proof.[52] Having acknowledged the value of the evidence, there is no justification for the court's not differentiating between evidence of reputation and of personal knowledge and belief as suggested by Professor Wigmore.[53] In short, there would seem to be no reason why the court, if it is disposed to move away from the majority rule, should not completely embrace the minority position. As stated by Professor Ladd, "[t]he emphasis upon the means of proving character should be directed to the probative quality of the testimony to be obtained rather than to the formalistic procedure of satisfying the demands of legal ritual."[54]

The North Carolina Supreme Court's decision in *State v. Stegmann* raises almost as many questions as it answers and will obviously need clarification in later cases. However, it seems to represent the first tentative steps on the part of the court to adopt a new approach to the controversial area of character evidence. At least for the time being, it is clear that character testimony may consist of both the general reputation of the individual in question and personal observations and opinions of the witness concerning the person in question. This is a new rule, and practicing attorneys in North Carolina should take careful note of it.

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Federal Courts—Bradford v. Weinstein: The Federal Courts Reopen the Door to Prisoners' Civil Rights Claims

Since the mid-1960's the federal courts have witnessed a tremendous influx of state prisoner petitions.[1] Claimants have sought civil

52. Proper requirements for laying a foundation for a witness's testimony and for cross-examination will serve to exclude testimony with an inadequate basis or founded on personal prejudice. Likewise, control of the proceedings by the presiding judge will avert a degeneration of the testimony into a listing of specific acts of the person in question or a recounting of his life's history, which are both still condemned.

53. VII J. WIGMORE, EVIDENCE § 1986 (3d ed. 1940).

54. Ladd, *supra* note 24, at 517-18.

1. Petitions filed by state prisoners in the federal courts totaled 13,423 in 1974, an increase of 1,439.3% over the total in 1960. The 1974 total is more than double the

relief under 42 U.S.C. section 1983[2] and release from incarceration through writs of habeas corpus.[3] The impetus for this influx of claims arose from the lack of effective grievance procedures within the prison system,[4] as well as from the concern expressed by some federal judges over the acute conditions in many state prisons.[5] As a result of the increasing number of state prisoner petitions and the judicial activism of some judges, federal courts began to engage actively in prison reform.[6] In *Preiser v. Rodriguez*,[7] however, the United States Supreme Court greatly inhibited the consideration of the merits of prisoners' claims by the federal courts.[8] Apparently motivated by concern over jammed dockets[9] and fears of federal judicial activism destroying federal-state

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6,248 petitions filed in 1966. Habeas corpus petitions increased from 5,339 in 1966 to 7,626 in 1974, a 42.8% increase. Civil rights petitions increased from 218 in 1966 to 5,236 in 1974, a 2,301.8% increase. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 220-21 (1974).

2. 42 U.S.C. § 1983 (1970) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Habeas corpus was originally a writ at common law. It is now codified in 28 U.S.C. §§ 2241-55 (1970).

4. *See* Singer & Keating, *Prisoner Grievance Mechanisms*, 19 CRIME AND DELINQUENCY 367 (1973). Singer and Keating conclude that the lack of effective grievance procedures is one of the major reasons for prison violence.

5. An example of the judicial concern over the outrageous conditions in many state prisons can be seen in Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). In *Jordan*, Chief Judge George Harris, registering a sense of outrage over the conditions he saw at California's Soledad prison complex, took steps "to restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States." *Id.* at 680.

6. The impetus for federal judicial action in the area of prison reform can be traced to the decision in Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). *See, e.g.*, Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972); Moore v. Ciccone, 459 F.2d 574 (8th Cir. 1972); Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971); Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971); Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970); Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968).

7. 411 U.S. 475 (1973).

8. The Washington Post described *Preiser* as a "setback for civil rights and civil liberties groups and the American Bar Association . . . . The Court effectively closed off access to federal courts which have shown the most sympathy for prisoner's grievances." Washington Post, May 8, 1973, § 5A, at 3, col. 3.

9. Although the Court in *Preiser* never referred to the large number of prisoner petitions, it is safe to assume that it was aware of the situation since briefs filed in the case dealt at length with this issue. Brief for Petitioner at 35, Brief for Respondent at 27, Brief for ABA as Amicus Curiae at 28, Preiser v. Rodriguez, 411 U.S. 475 (1973). The Study Group on the Caseload of the Supreme Court has suggested an imposition of unique exhaustion requirements on prisoners' section 1983 actions. *See* Doyle, *The Court's Responsibility to the Inmate Litigant*, 56 JUDICATURE 406, 409 n.8 (1973).

relations,[10] the Court placed serious restraints on the prisoner's use of section 1983.[11] The Court found that many categories of prisoners' section 1983 claims fall within the "core of habeas corpus" and thus require exhaustion of available state remedies before the federal courts can consider the claims.[12] A year after the *Preiser* decision, in *Bradford v. Weinstein*[13] the Fourth Circuit Court of Appeals extended jurisdiction to a prisoner's section 1983 challenge to a parole proceeding,[14] a situation in which the *Preiser* test arguably required habeas corpus proceedings.[15] *Bradford*'s rejection of the *Preiser* test in this situation illustrates the lower courts' desire to limit the applicability of *Preiser* and to establish the federal courts as a forum for prison reform.

The *Bradford* appeal was a consolidation of two class action suits, one brought in the name of Howard Bradford, an inmate in the North Carolina prison system, and the other by Levi Jenkins, a prisoner in South Carolina. Both prisoners brought section 1983 actions alleging that the hearings in which they were denied parole did not comport with due process of law.[16] The federal district court in North Carolina denied Bradford's claim, holding that the due process clause does not apply to parole proceedings. The federal district court in South Carolina dismissed Jenkins' petition on the ground that plaintiff's goal was parole and that therefore the claim was "within the core" of habeas corpus. The court concluded that under *Preiser* Jenkins would be required first to exhaust his state remedies.[17] On appeal the Fourth Circuit reversed the lower courts' decisions.[18] First, considering the due process claim, the court found that the due process clause does apply to parole eligibility proceedings.[19] However, the court postponed a decision on what procedure the due process clause requires in this situation until after the district court conducted a full evidentiary investigation.[20] The court then considered whether the prisoners' claims were proper under section 1983. After a short examination of *Preiser*, the court

10. 411 U.S. at 490-92.
11. *Id.* at 489-90.
12. *Id.* at 487-94.
13. 519 F.2d 728 (4th Cir. 1974). The Supreme Court heard the case and delivered a per curiam opinion that declared the case moot since Bradford had been released on parole prior to the date of hearing. 96 S. Ct. 347 (1975).
14. 519 F.2d at 734-35.
15. *See id.* at 735-38 (Bryan, J., dissenting).
16. *Id.* at 729-30.
17. *Id.* at 730.
18. *Id.* at 735.
19. *Id.* at 732.
20. *Id.* at 733.

concluded that the relief requested was not for immediate release from confinement and thus was not "within the core of habeas corpus" as defined by *Preiser*.[21] The court therefore held that it had jurisdiction to consider the prisoners' section 1983 claim.[22] Judge Bryan filed a vigorous dissent to the majority's granting of jurisdiction. Stating that *Preiser* must be applied broadly in order to protect the state interest in the area, Bryan viewed the plaintiffs' challenges to the parole hearings as attacks on their detention and thus proper subjects for habeas corpus.[23]

Before analyzing the conflicting applications of the *Preiser* test by the majority and dissent in *Bradford*, it will be helpful to examine the development of the writ of habeas corpus and section 1983. An understanding of the overlapping features of these two procedures will facilitate an understanding of the problems in applying the *Preiser* test to a situation such as the one in *Bradford*.

The principal means for prisoners to attack the legitimacy of their confinement has traditionally been to seek a writ of habeas corpus.[24] Originally the writ offered a prisoner a method to challenge the legitimacy of his confinement by attacking the validity of his sentence or conviction.[25] Release from confinement was the available relief.[26] However, the federal courts expanded the writ to remedy unconstitutional conditions of confinement and to alleviate gross mistreatment of prisoners.[27] It was no longer necessary for the inmate to seek total release from prison in order to obtain the writ.[28] However, there is one significant limitation on the use of habeas corpus. In the 1886 case *Ex parte Royall*[29] the Supreme Court strongly urged the federal courts, in cases of a state prisoner seeking habeas corpus relief, to await the exhaustion of available state judicial remedies before granting jurisdiction over the prisoner's federal habeas corpus claim. The requirement

21. *Id.* at 733-34.
22. *Id.* at 734-35.
23. *Id.* at 736.
24. *See* note 3 *supra*.
25. *See* Preiser v. Rodriguez, 411 U.S. at 484. *See generally Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).
26. *See generally Developments in the Law*, 83 HARV. L. REV., *supra* note 25, at 1079.
27. The federal courts expanded the writ in Coffin v. Riechard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945) where habeas corpus was recognized as a remedy for unconstitutional conditions of confinement. The Supreme Court affirmed this expansive role in Wilwording v. Swenson, 404 U.S. 249 (1971).
28. In Johnson v. Avery, 393 U.S. 483 (1969), the Supreme Court approved the use of habeas corpus to challenge a prisoner's solitary confinement. It was not necessary for the inmate to seek total release from prison.
29. 117 U.S. 241, 251 (1886).

of exhausting state remedies, born of a policy of preserving comity between the federal and state judiciaries, is now codified.[30]

Although the reach of habeas corpus has been extended to allow consideration of the conditions of confinement,[31] section 1983 has been seen as a more appropriate vehicle to raise such challenges. The Civil Rights Act, of which section 1983 is a part, was designed to combat the injustices and discrimination that existed throughout the South during Reconstruction.[32] In *Monroe v. Pape*[33] the Supreme Court rejuvenated the statute by holding that section 1983 provides a federal remedy for violations of an individual's constitutional rights by officials acting under "color of state law."[34] The Act has since been applied to many areas of state involvement,[35] including prison problems.[36]

Although the coverage of the two acts clearly overlaps, there are several reasons for prisoners' preference of section 1983.[37] The most obvious reason is that section 1983 does not require exhaustion of state remedies.[38] Exhaustion is time-consuming and expensive,[39] and to prisoners, who have very little concern for federal-state comity, it simply appears to be another obstacle constructed by the judicial system to prevent consideration of their grievances. Additionally, section 1983 offers a wide range of relief, including damages and broad equity

30. 28 U.S.C. §§ 2254(b)-(c) (1970).

31. *See* note 27 *supra.*

32. *See* Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond,* 60 NW. U.L. REV. 277 (1965). This article contains a good discussion of the history of section 1983 and the Civil Rights Act. The article also includes excerpts from speeches by Congressmen showing their concern over violence in the South after the Civil War and demanding passage of the Act.

33. 365 U.S. 167 (1961).

34. *Id.* at 184-85, 187.

35. *See, e.g.,* Wood v. Strickland, 420 U.S. 308 (1975) (public education); Monroe v. Pape, 365 U.S. 167 (1961) (police procedure); Holmes v. New York Housing Authority, 398 F.2d 262 (2d Cir. 1968) (public housing).

36. The Supreme Court specifically approved the use of section 1983 for relief from certain prison conditions. The cases approved in *Preiser* were Haines v. Kerner, 404 U.S. 519 (1972) (per curiam); Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam); Houghton v. Shafer, 392 U.S. 639 (1968) (per curiam); and Cooper v. Pate, 378 U.S. 546 (1964) (per curiam).

37. *See generally* Turner, *Federal Jurisdiction and Practice in Prisoner Cases,* in PRISONERS' RIGHTS SOURCEBOOK 243 (M. Hermann & M. Haft eds. 1973).

38. Monroe v. Pape, 365 U.S. 167, 183 (1961). In finding that one did not have to resort to a state remedy even if it would give the relief if enforced, Justice Douglas stated: "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.*

39. To complete the gamut of state remedies before federal relief is available may require months or even years. In cases where the challenge is to the parole procedure the case might actually become moot by the time the case is heard by the federal courts. *See* note 13 *supra.*

powers.[40] Class actions can also be maintained under section 1983.[41] Finally, section 1983 enables the petitioner to utilize the liberal discovery procedures under the federal rules of procedure,[42] as compared to discovery pursuant to a federal habeas corpus claim, which is allowed only upon obtaining a court order.[43]

Although these two statutory remedies were at one time equally available to state prisoners, the Supreme Court's attempt in *Preiser v. Rodriguez* to define the relationship between the two resulted in serious limitations on the use of section 1983.[44] The case involved a civil rights action by three prisoners. Their complaint alleged that they had been deprived of previously earned good time credits without being afforded due process.[45] The earned credits counted towards the reduction of their sentences. The Supreme Court noted that the "essence of habeas corpus is an attack by a person upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody."[46] Since the remedy of restoration of the lost credits would shorten the prisoners' time of confinement, the Supreme Court read the prisoners' challenges as being to the "fact or duration" of their illegal confinement and "as close to the core of habeas corpus as an attack on the prisoner's conviction . . . ."[47] The Court held, therefore, that the prisoners' complaints should be treated as applications for writs of habeas corpus and dismissed for failure to exhaust state remedies.[48] The majority announced the test that if the prisoner is challenging the fact or duration of his confinement and seeking release or shortening of his term of confinement, then habeas corpus is the sole remedy.[49] The Court reasoned that this test would protect the policy behind the exhaus-

40. *See* note 2 *supra.*

41. The requisites of rule 23 of the Federal Rules of Civil Procedure must be met. FED. R. CIV. P. 23(b)(2). *See* Zagaris, *Recent Developments in Prison Litigation: Procedural Issues and Remedies*, 14 SANTA CLARA LAW. 810, 831 (1974). Zagaris points out that class actions are particularly well suited for prison plaintiffs. Zagaris notes several reasons including that: (1) with a class of plaintiffs, the complete action cannot be declared moot by the release of one prisoner, (2) the large number of plaintiffs allows more extensive discovery, and (3) that attorneys' fees are often awarded in the class action context. *Id.* at 831-34.

42. FED. R. CIV. P. 26.

43. *See* Harris v. Nelson, 394 U.S. 286 (1969).

44. 411 U.S. at 489-90.

45. *Id.* at 476-77.

46. *Id.* at 484.

47. *Id.* at 489.

48. *Id.* at 481. In essence the Court affirmed the court of appeals ruling in the companion case of United States *ex rel.* Katzoff v. McGinnis, 441 F.2d 558 (2d Cir. 1971).

49. 411 U.S. at 500.

tion requirement and allow the states to have the first opportunity to correct state errors.[50]

Despite the apparent simplicity of the test announced in *Preiser*, the decision left the lower courts confused as to how to apply the test. *Preiser* clearly barred certain section 1983 suits: challenges to procedures involving loss of good time credit, since relief in such a suit would result in the prisoner's early release;[51] and challenges to parole revocations, since a successful claim would reinstate parole.[52] Equally as clear, *Preiser* would not require exhaustion in certain situations: a challenge to the conditions of confinement, such as a claim of inadequate physical facilities; and a challenge for which no adequate state remedy existed.[53] However, there remained many intermediate situations which did not clearly fall either within or outside the Court's concept of the "core of habeas corpus."[54]

Bradford confronted the court of appeals with just such a difficult situation for application of the *Preiser* test. Since the prisoners were challenging the constitutionality of the procedure employed at the parole board hearings,[55] their allegations did not easily fall into the category of "conditions of confinement";[56] nor could their petitions be viewed as requesting "release." Rather, their claims were directed at the procedure of the parole board, which is an intricate part of the release system. If the court interpreted *Preiser* to apply only in the narrow circumstances in which the prisoner's challenge is directed towards the fact or

50. *Id.* at 491-92. Justice Brennan authored a dissenting opinion that criticized the majority's decision as "analytically unsound." The dissenters argued that the protection of federal rights should not succumb to protection of federal-state relations and that section 1983 should take precedence over habeas corpus and its exhaustion requirement. Justice Brennan pointed out the difficulty in applying the majority's test as well as its failure to prevent federal-state friction. *Id.* at 475, 500-25 (dissenting opinion).

51. *Id.* at 475.

52. In Morrissey v. Brewer, 408 U.S. 471 (1972), a case prior to *Preiser*, the Supreme Court found that exhaustion was required in an administratively imposed parole revocation. *See also* Mason v. Askew, 484 F.2d 642 (5th Cir. 1973) (per curiam). In *Mason* the prisoner contended that parole revocation was inflicted with substantive and procedural infirmities and sought relief under section 1983. The court denied the claim on the grounds of *Preiser*.

53. *See, e.g.*, Plano v. Baker, 504 F.2d 595, 597 (2d Cir. 1974).

54. Examples of situations not clearly within or outside the Court's concept of "core of habeas corpus" are challenges to parole hearings, challenges to procedures assigning an inmate to a special facility (such as a hospital for drug abusers) and challenges to transfers of an inmate from one prison facility to another.

55. 519 F.2d at 734-35.

56. The most clear cut situations falling within "conditions of confinement" are challenges to physical conditions or illegal actions of guards or other prison personnel. *See, e.g.*, Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973).

duration of his confinement and actual release is requested, then it would have to conclude that the prisoners should be allowed to pursue their section 1983 claims. However, if the court broadened the scope of *Preiser* to include within the core of habeas corpus any challenge to the release system, regardless of how remote the chance of actual release, then their claims would necessarily fail because state remedies were not first exhausted.

One member of the court, Senior Judge Bryan, chose the latter alternative and read *Preiser* to require habeas corpus relief when a prisoner is attacking the parole hearing process.[57] Reasoning that the parole hearing is an event in the chain of ultimate detention and that a change in the hearing procedure may eventually affect the duration of incarceration, Bryan believed that the prisoners' complaints related to their detention, not to the circumstances of imprisonment.[58] Therefore, he concluded that plaintiffs' claims fell within the core of habeas corpus, thus initially requiring exhaustion of state remedies.[59] Bryan's view raises the question whether the possibility of release, no matter how remote, should be regarded as within the core. In *Preiser* the prisoners were not actually seeking release but were challenging procedures that denied them good time credits.[60] However, if their claims had been successful they would have been entitled to immediate release, with no further proceedings necessary. Even so, release was actually collateral to the claim. Bryan seemed to have seized on the collateral nature of release in *Preiser* and extended it to support the proposition that any potential release is within the core. Bryan justified such an extension on the basis of protection of state-federal comity.[61]

Judges Winter and Butzner took the opposite approach in narrowly applying the *Preiser* test. They believed that *Preiser* does not apply unless the purpose of the suit is to seek release or to shorten the duration of confinement.[62] In *Bradford*, however, the prisoners did not request release; a favorable ruling would only entitle them to another parole hearing.[63] By narrowly construing the language of *Preiser*, the majority seemed to reason that the remote chance that the prisoners' claims would actually expedite their release was not sufficient to bring their

57. 519 F.2d at 736.
58. *Id.*
59. *Id.* at 736-37.
60. 411 U.S. at 476-77.
61. 519 F.2d at 736-37.
62. *See id.* at 733.
63. *Id.* at 730-32.

claims within the core of habeas corpus. Other lower federal courts have shared the majority's view that the "possibility of release" should not control in determining whether the claim is within the core of habeas corpus.[64]

The majority's restricted application of *Preiser* receives a great deal of support from *Gomez v. Miller*,[65] a three-judge district court opinion that was given summary affirmance by the Supreme Court.[66] As there was a detailed dissent by Judge Moore on the habeas corpus issue,[67] the Supreme Court must have considered the jurisdictional question and found the district court's opinion acceptable.[68] In *Gomez* three persons challenged their incarceration in hospitals for the criminally insane.[69] The plaintiffs, who were indicted for various felonies but were untried, brought a section 1983 action contending that the equal protection and due process clauses of the fourteenth amendment required the state to prove in a jury trial that they were "dangerous" before they could be committed to a prison hospital.[70] The case is similar to *Bradford*, for in neither instance was there a challenge to the state's right to place the plaintiffs in their particular situation, namely placing them in a hospital or denying them parole, as long as it was done constitutionally. The district court in *Gomez* rejected the state's contention that habeas corpus relief was required.[71] The court noted that at best the relief sought would result in a transfer to a civilian

64. In Wingard v. North Carolina, 366 F. Supp. 982 (W.D.N.C. 1973), a district court allowed a section 1983 claim, stating that the relief prayed for, if granted, would make the prisoner eligible for parole but would not constitute an actual grant of parole and thus not actual release. As in *Bradford*, the court read *Preiser* to require the prisoner to pursue habeas corpus when the only relief sought is an immediate or more speedy release from prison.

In Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974), state prisoners brought section 1983 actions challenging the constitutionality of prison disciplinary procedures. They did not seek immediate or earlier release from prison. Even though the challenged disciplinary procedures had some effect on determining length of imprisonment, the Ninth Circuit found that the effect of those procedures on the duration of the plaintiff's sentence was too speculative and incidental to bring any part of the action within the core of habeas corpus.

65. 341 F. Supp. 323 (S.D.N.Y. 1972), *aff'd mem.*, 412 U.S. 914 (1973).

66. *Id.*

67. *Id.* at 333 (Moore, J., dissenting). Judge Moore felt that the petition should be read as a writ of habeas corpus and thus the prisoner should be required to exhaust state remedies. Judge Moore based his conclusion on the policy of protecting federal-state comity.

68. At least one federal court has agreed that the Supreme Court could not have overlooked the jurisdictional question in giving *Gomez* summary affirmance. Blouin v. Dembitz, 489 F.2d 488, 491 n.6 (1973).

69. 341 F. Supp. at 324.

70. *Id.*

71. *Id.* at 328.

hospital and not outright release.[72] Such reasoning seems equally applicable to *Bradford*, in which the relief would at best result in another hearing, not in outright release. In both *Gomez* and *Bradford* the relief being sought would bring the plaintiffs closer to release. But the Supreme Court in affirming *Gomez* impliedly approved the reasoning which found that simply improving the chances of release was not sufficient to require the use of habeas corpus.

The question still remains why the federal courts have been unwilling to extend *Preiser* to the limits suggested by Judge Bryan. There are several answers, two of which can be found in the *Bradford* court's use of *Wolff v. McDonnell.*[73] In *Wolff* the Supreme Court allowed a section 1983 challenge to the procedures used in revoking good time credits.[74] Judge Bryan took issue with the majority's citing of *Wolff* to support their interpretation of the *Preiser* test. Bryan distinguished *Wolff* on the ground that it involved a claim for damages, which made it automatically a proper subject for section 1983 relief.[75] Although correct in his conclusion, Bryan's reasoning points out a flaw in the *Preiser* test. *Preiser* recognized that since damages are not recoverable in habeas corpus, "a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies."[76] The result is that, when possible, prisoner petitions will request damage relief. In a situation in which there is a claim for damages coupled with a complaint that might otherwise be relegated to the habeas corpus procedure, the federal courts could either retain the entire case on theories of pendent jurisdiction or retain the damage claim only and send the remainder of the suit to the state courts.[77] The second alternative can result in waste of judicial energy as well as increased friction between the federal and state courts due to the possiblity of inconsistent results.[78] To avoid having to make

72. *Id.*
73. 418 U.S. 539 (1974), *discussed in* 519 F.2d at 737-38.
74. 418 U.S. at 554-55.
75. 519 F.2d at 737.
76. 411 U.S. at 494.
77. *See* Zagaris, *supra* note 41, at 831. However, one court has found that it would not consider a damage action if a ruling would imply that a state conviction is or would be illegal. Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974). In Edwards v. Illinois Dep't of Corrections, 514 F.2d 477, 478 n.3 (7th Cir. 1975), the court noted that it did not have to dismiss the plaintiff's claim for money damages for failure to exhaust state remedies. Also, in Henderson v. Secretary of Correction, 518 F.2d 694 (10th Cir. 1975), the court recognized that as long as the plaintiff asserted damages his claim could be heard.
78. Zagaris, *supra* note 41, at 831.

this choice, many federal courts have attempted to limit *Preiser* in order to have jurisdiction over most prisoners' section 1983 claims.

The majority in *Bradford* also had to deal with the broad language employed by *Preiser* in announcing a policy of protecting the state's interest in having the first opportunity to correct the errors made in the internal administration of its prisons. The language was arguably broad enough to include challenges to the parole system, as well as all other attacks on prison administration.[79] The question to be resolved was whether the policy of protecting the state's interest in the prison system demanded a consistently broad application of the *Preiser* test. The Fourth Circuit concluded that *Preiser* was clearly not intended to preclude all section 1983 challenges by prisoners. It supported this position by noting that the Court in *Preiser* had carefully reaffirmed its holding in four earlier cases in which prisoners had brought section 1983 claims challenging some aspect of the penal system.[80] Also, the *Bradford* court demonstrated that the Supreme Court had further limited the broad policy language by its later holding in *Wolff*. In *Wolff* the Supreme Court disallowed restoration of good time credits but did allow a determination of the validity of the procedures for revoking the credits.[81] Impliedly, the Court found that the state interest does not preclude such a challenge to prison administration systems as long as release is not sought.[82] Thus, the policy of protecting the state's interest should not preclude the claim in *Bradford*, since the claimant, as in *Wolff*, sought procedural protection without asking for release.

By limiting the application of the policy of protecting state interest to the situation in which the prisoner seeks release, courts are acting

79. The *Bradford* court was quick to acknowledge the broad scope of the relevant language. 519 F.2d at 734. The relevant discussion in *Preiser* can be found at 411 U.S. 491-92.

80. *Preiser* approved four state prisoner cases which did not require federal habeas corpus remedy: Haines v. Kerner, 404 U.S. 519 (1972) (per curiam) (claim arising out of an allegedly unconstitutional solitary confinement); Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam) (challenge to living conditions and disciplinary measures imposed while in maximum security of prison); Houghton v. Shafer, 392 U.S. 639 (1968) (per curiam) (legal materials confiscated by prison officials); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam) (prisoner denied permission to purchase specific religious publications). It seems clear that in each case the Supreme Court is approving of the federal judiciary's interference with the state prison system.

81. Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

82. *See id.* at 554-55.

Wolff can be distinguished from *Bradford* on the ground that the claimant is seeking damages, but as mentioned previously, this argument seems to be placing form over substance. There is no logic in an argument that state interests should be protected when no damages are sought while disregarding those interests if the claimant seeks damages. *See* text accompanying notes 71-74 *supra*.

consistently with the congressional intent in placing an exhaustion requirement in the habeas corpus statute.[83] Originally, the rule was based on considerations of comity between federal and state judiciaries and did not extend to challenges to state administrative action.[84] Exhaustion seems to have developed to allow states a chance to determine if the prisoner was being legally detained before the federal courts could pass judgment.[85] Thus, it seems to be correct to require exhaustion for challenges to state prison administrations only when a successful challenge would result in release. There is a valid distinction between the federal courts ordering relief that will release a prisoner who had violated state laws, as opposed to relief that will only require the states to adjust their administrative procedures. Since the prisoner violated state laws, the state courts should have the first opportunity to determine if the prisoner should be released. However, there is no similar policy requiring the state to have the first opportunity to consider allegedly unconstitutional prison administrative procedures. By limiting the policy expressed in *Preiser*, the courts have paid tribute to this distinction and have simplified the relevant inquiry to whether the claimant is seeking release or whether release would result from the relief requested.

A final underlying reason for the hesitancy of the federal courts to broaden *Preiser* is the changing view of the status of prisoners. In *Cruz v. Beto*[86] the Supreme Court, rejecting the notion that the prisoner occupies a basically rightless status, stated that the federal courts are "to enforce the constitutional rights of all 'persons,' including prisoners. . . . [and that] persons in prison, like other individuals, have the right to petition the Government for redress of grievances. . . ."[87] This changed concept of the prisoner's status seems to have developed during the prison reform period of the past decade. During this period the federal courts have offered prisoners the most sympathetic forum available,[88] and it seems that federal judges want the federal

83. Judge Parker, the author of the habeas corpus statute, explains the purpose of the statute. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1948).

84. *Id.*

85. *See* S. REP. No. 1559, 80th Cong., 2d Sess. (1948); H.R. REP. No. 308, 80th Cong., 1st Sess. (1947).

86. 405 U.S. 319 (1972) (per curiam).

87. *Id.* at 321.

88. Judge James Doyle of the U.S. District Court for the Western District of Wisconsin commented on how he thought the courts should respond to prisoners' claims: "I believe that the courts should be no less and no more painstaking, searching, and respectful in their response to these litigants than they are in their response to any other constitutional litigation." Doyle based his answer on the oath administered to federal judges: "I do solemnly swear that I will administer justice without respect to persons . . .

courts to continue to be vehicles for prison reform. By limiting the application of *Preiser*, federal judges can continue to insure prisoners a forum in which to redress their grievances.

Bradford holds a place of importance among the numerous decisions applying the *Preiser* test. The challenge to the parole hearing presented the court with a situation in which it could have justified an extension of the *Preiser* test and channeled the claim back into the state courts. However, the court said in essence that simply improving the chances of release is not sufficient to be within the "core." *Bradford* interpreted *Preiser* to require prisoners to proceed under habeas corpus only when the challenge is *directly* to the fact or duration of confinement and the relief requested is immediate release from imprisonment.

Thus, in the Fourth Circuit, section 1983 will be useful not only to challenge poor physical conditions but also to challenge the internal administration of many prison proceedings. Besides allowing challenges to the parole hearing, the Fourth Circuit should grant jurisdiction of section 1983 claims that challenge the procedures used in deciding to transfer an inmate from one prison facility to another, assuming there was a deprivation of liberty or property, and challenges to the procedures that place an inmate in special facilities (such as special facilities for drug offenders).[89] In the above contexts, the prisoners should be able to seek a restraint of enforcement of present procedural rules and adoption of new ones.[90] Hopefully, these claims will force lower courts as well as the Supreme Court to rule on the constitutionality of many prison procedures. Favorable rulings in the federal courts will force the prisons to adopt procedures that reflect the fact that prisoners do have rights and will eventually lead to uniform procedures among the state prisons. Inmates have sought a forum in which they can play an active role in changing the penal system from one that views the prisoner as being constitutionally naked to one that recognizes that prisoners do have rights that must be protected.[91] *Bradford*'s extension of jurisdic-

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do equal right to the poor and to the rich . . . support and defend the Constitution." Doyle, *supra* note 9, at 406-07.

89. Even if a transfer from one facility is considered "release" within the *Preiser* rationale, the challenge to the procedures employed in deciding on the transfer should, under *Bradford*, be too remote to be considered a request for "release" and thus not within the "core."

90. Under section 1983 the prisoner can seek both declaratory and injunctive relief which would accomplish these results.

91. Singer and Keating have pointed out that the lack of effective grievance procedures is one of the major reasons for prison violence. Singer & Keating, *supra* note 4, at 367. It is difficult for the average citizen to appreciate the frustration that

tion over prisoners' section 1983 claims demonstrates that the federal courts will offer the prisoners this sympathetic forum and enable them to take an active role in correcting unconstitutional conditions and procedures in the state prisons.

WILLIAM SIDNEY ALDRIDGE

Federal Jurisdiction—The Status of Public Officials as "Persons" Under 42 U.S.C. Section 1983

The United States Supreme Court has declared that the right of a tenured public school teacher to continued employment is a protected property interest[1] that cannot be taken away without due process.[2] The employee facing removal is generally entitled to a hearing on the charges brought against him in which he can confront and cross-examine witnesses.[3] Recently, the Fourth Circuit Court of Appeals in *Burt v. Board of Trustees of Edgefield County School District*[4] and *Thomas v. Ward*[5] greatly enhanced the opportunity for the victim of

prisoners experience within the prison grievance system and parole system. James Hoffa, former president of the Teamsters' Union, commented on his observations of the parole board while he was in prison: "I know of an individual who served 27 years in prison and was allowed exactly three minutes to appear in front of the parole board and then they said, Well, we want to study you two more years. What they found out in 29 years that they couldn't find out in 27 I'll never find out." Hoffa, *Criminal Justice from the Inside*, 56 JUDICATURE 422, 425 (1973). Hopefully prisoners' section 1983 suits will be effective in eliminating this type of process.

One lawyer seemed to sum up the situation best: "It is often difficult for attorneys, or courts, whose entire universe revolves around rational decision-making, to fully comprehend the total and arbitrary power which has characterized prison authorities' control over the lives of prisoners. Administrative decisions which drastically affect the lives and liberty of thousands of prisoners have often been made on the flimsiest of information, without review." Brief for the National Council on Crime and Delinquency as Amicus Curiae at 3, Wolff v. McDonnell, 418 U.S. 539 (1974).

1. Board of Regents v. Roth, 408 U.S. 564, 576 (1972) (dictum). In Perry v. Sinderman, 408 U.S. 593 (1972), the Court expanded *Roth* to include not only those teachers who were formally tenured, but also those who had an implied or "de facto" tenure. Such tenure is to be ascertained by an examination of the historical policies and practices of the institution. 408 U.S. at 602-03. For a similar statutory doctrine see N.C. GEN. STAT. § 115-142 (1975) (establishing formal dismissal procedures for teachers with more than three consecutive years of service in one school district).

2. Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972).

3. McNeil v. Butz, 480 F.2d 314, 321 (4th Cir. 1973).

4. 521 F.2d 1201 (4th Cir. 1975).

5. Civil No. 74-1541 (4th Cir., Nov. 24, 1975).